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10/586,204	09/29/2006	Wei-Ping Chen	2009_1195	4772

  

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EXAMINER	
KOSACK, JOSEPH R	

  

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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

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WENDEROTH, LIND & PONACK, L.L.P.  
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: PETITION DECISION

In re Application of:  
Chen et al.  
Serial No.: 10/586,204  
Filed: July 13, 2006  
Attorney Docket No.: 2009\_1195

The request filed October 22, 2010 to withdraw finality of the Office action of July 22, 2010 is being treated as a petition under 37 CFR § 1.181.

## BACKGROUND

More recently, applicants filed an RCE on June 2, 2010.

In response thereto, the examiner mailed a final Office action on July 22, 2010 setting a three month shortened statutory period for reply. In this Office action, claims 38-44 were pending and were rejected. Specifically, claims 38-44 continued to be rejected under 35 U.S.C. 103(a) as being unpatentable over Hayashi et al. in view of Nettekoven et al. and Berlin et al. Claims 38-44 were previously provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 13- 18 of copending Application No. 10/586,287. Claims 38-44 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hayashi et al. in view of Nettekoven et al. and Berlin et al. Claims 38-44 were provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over at least claims 44 and 54-60 of copending Application No. 10/586,287.

In reply to the final Office action of July 22, 2010, applicants filed this petition under 37 CFR § 1.181 on October 22, 2010, requesting withdrawal of finality of the Office action of July 22, 2010.

## DISCUSSION

The petition and the file history have been carefully considered.

Applicants argue that the "Examiner has misinterpreted the claims, and as a result, the final rejection is premature and should be withdrawn (see MPEP 706.07(d)). More specifically, applicants argue that the "Examiner has misinterpreted claim 38, and that the finality of the rejection set forth in the current Office Action is premature, and should be withdrawn.

Applicants' argument has been accorded careful consideration but it is not persuasive. Applicants should note that arguments to the merits of a rejection is not a petitionable matter but an appealable one. Note the following rule:

§ 1.181 Petition to the Director.

(a) Petition may be taken to the Director:

(1) From any action or requirement of any examiner in the ex parte prosecution of an application, or in ex parte or inter partes prosecution of a reexamination proceeding which is not subject to appeal to the Board of Patent Appeals and Interferences or to the court;

It is noted that applicants' argument in the instant petition is not directed to an action or requirement of the examiner but is directed solely to the merits of the rejections maintained by the examiner. Specifically, applicants do not agree with the examiner's rejections over claims 38-44. It is deemed that a *clear issue for appeal* between the examiner and applicants regarding the status of the claimed invention and reasons why the claims are currently rejected has been established. Applicants are reminded of the right to the Appeal process concerning substantive issues involving the rejection of claims; see 37 CFR 1.191.

Accordingly, applicants' arguments are not persuasive that the final Office action issued July 22, 2010 was premature and the finality of the Office action will not be withdrawn.

## DECISION

The petition is **DENIED**.

Should there be any questions about this decision please contact Marianne C. Seidel, by letter addressed to Director, TC 1600, at the address listed above, or by telephone at 571-272-0584 or by facsimile sent to the general Office facsimile number, 571-273-8300.

Remy Yucel  
Director, Technology Center 1600